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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
C. DION HENDERSON,)	OEA Matter No. 1601-0050-09
Employee)	
)	Date of Issuance: July 16, 2012
DEPARTMENT OF CONSUMER)	
AND REGULATORY AFFAIRS,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

C. Dion Henderson (“Employee”) was a Consumer Protection Investigator with the Department of Consumer and Regulatory Affairs (“Agency”). On October 21, 2008, Employee received a notice of final decision to remove him from his position based on the charge of malfeasance.¹ He filed a Petition for Appeal with Office of Employee Appeals (“OEA”) on November 25, 2008.

Employee contended that Agency’s decision to remove him from District employ was erroneous because the weight of the evidence did not support the charge of malfeasance.² He further claimed that the handwriting on the application was not his own.³ Employee asserted that

¹ Employee was charged with malfeasance for accepting a bribe and dereliction of his duties as an employee of the government. Specifically, Employee was charged with accepting money from the owner of an unlicensed nail salon in exchange for obtaining a business license. Additionally, Employee failed to issue a Notice of Infraction (“NOI”) to said business and inappropriately referred an expediter for hire.

² *Petition for Appeal*, p. 3 (November 25, 2008).

³ *Petition for Review*, p. 6-7 (April 8, 2011).

Agency inadequately performed an investigation that did not meet the requirement that “each agency shall afford fair and equitable treatment” as set forth by D.C. Personnel Regulations.⁴

Agency filed its Answer to Employee’s Petition for Appeal on January 2, 2009. It believed that Employee was removed for just cause. Agency further denied any allegations or assertions that the decision to terminate Employee was subjective in nature or that there was misuse of managerial authority. It maintained that there were three specific causes for removal which support the allegation of malfeasance. The first cause for removal was that Employee accepted money from the business owner to facilitate the acquisition of a business license. Secondly, it was determined that Employee knew that Beau Nails Salon was operating a business without the required license and failed to report the violation or cite the business for the infraction. The final cause for removal was that Employee inappropriately provided a referral for an expediter for hire.⁵ Based on the D.C. Personnel Regulations §1606.3, Agency determined that these three charges were sufficient cause to warrant removal of Employee.⁶

On January 19, 2011, the OEA Administrative Judge (“AJ”) held an evidentiary hearing. Thereafter, he issued his Initial Decision. With regards to the charge of malfeasance, the AJ found that Agency’s penalty was appropriate and within the range allowed by law, regulation, and any applicable table of penalties. He held that Agency’s determination was consistent with the severity of Employee’s actions, and it did not err in the dismissal of Employee.⁷

The AJ found Agency’s witnesses to be more credible than Employee.⁸ He determined that Employee improperly led the business owner to believe that he could secure a business

⁴ Counsel for Employee inadvertently cited §1606.2, but this language is actually found in D.C. Personnel Regulations, §1606.1 (2008). *Id.*

⁵ An expediter is a group of independent businesses that assist applicants with the DCRA licensing process. *Answer to Employee’s Appeal*, Exhibit F (January 2, 2009).

⁶ *Id.* at 1-3.

⁷ *District Personnel Manual (“DPM”), Chapter 16, Table of Appropriate Penalties 1619.1* (February 22, 2008).

⁸ The AJ held that Agency’s witnesses all testified in a forthright and direct manner, while Employee was unconvincing and at times evasive. *Initial Decision*, p. 6 (March 7, 2011).

license for him for a nominal fee. As for Employee's contention that the handwriting found on that application was not his, the AJ reasoned that Employee should have made his handwriting expert available for testimony instead of relying on hearsay statements. Instead, Employee introduced a hearsay statement from an out of state handwriting expert, who was not made available to give testimony. Additionally, the AJ held that Employee failed to issue a NOI citation to the business owner for operating a business without the required license. The AJ concluded that Employee betrayed the public's trust by securing funds to assist with the licensure of a business. Accordingly, Agency's decision to terminate Employee was upheld.⁹

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board. In his petition, Employee asserted that the AJ's findings were not supported by substantial evidence. He argued that the business owner's testimony was contradictory and did not provide support for Agency's version of the facts. He contended that the timeline of events proffered by Agency was impossible.¹⁰ Employee further maintained that the AJ had no basis to conclude the handwriting on the application was his. He also claimed that the AJ did not address all issues of law and fact raised on appeal -- specifically, the allegation that he improperly referred a business owner to an expeditor. Employee stated that he was denied due process because he was neither notified of this charge, nor given the opportunity to respond to the charge prior to the termination.¹¹ Finally, Employee claimed that the AJ demonstrated bias at the hearing. Therefore, he requested that the Initial Decision be reversed.¹²

On May 6, 2011, Agency submitted an Opposition to the Employee's Petition for Review. It reasoned that there was ample evidence to support the AJ's findings that Employee,

⁹ *Id.* at 7.

¹⁰ *Petition for Review*, p. 6 (April 8, 2011).

¹¹ Employee also argues that the charge that he failed to issue a NOI was untimely because the alleged infraction occurred in 2004 and he was charged four years later. *Id.* at 8-9.

¹² *Id.*

in his official capacity, accepted \$200 cash from an unlicensed business owner and failed to issue a NOI as required by law. Agency noted that the AJ included all disputed material issues in his decision and did not need to address the due process argument concerning an alleged charge of improperly referring a business owner to an expeditor. Agency also discussed that the timeline argument had no bearing on case, nor is it a basis for reversal.¹³ The Employee filed a Reply to the Agency's Opposition to the Employee's Petition for Review dated May 16, 2011.¹⁴

Employee argues that the AJ's witness credibility determinations were not consistent with the record. However, the business owner's testimony did not waver with respect to meeting and speaking with Employee, as well as furnishing Employee \$200 for assistance with obtaining the appropriate business license. The business owner reiterated his statements to two Agency employees, the Office of Service Integrity ("OSI") investigator, and also in a signed, notarized affidavit to the District of Columbia Office of the Attorney General ("OAG").¹⁵ Additionally, the business owner offered the same testimony at the evidentiary hearing.¹⁶

OEA has held that it will not question an AJ's credibility determinations. The Court in *Metropolitan Police Department v. Ronald Baker*, 564 A2d. 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. The AJ concluded that the business owner's testimony was credible. Thus, this Board will not second guess his credibility determinations.¹⁷

¹³ *Agency's Opposition to the Employee's Petition for Review*, p.1-10 (May 6, 2011).

¹⁴ Employee reiterated the arguments set forth in the Petition for Review. *Reply to Agency's Opposition to Employee's Petition for Review*, p. 1-5 (May 16, 2011).

¹⁵ *Answer to Employee's Appeal*, Exhibit I (January 2, 2009).

¹⁶ *OEA Hearing Transcript*, p. 42, 46 (January 19, 2011).

¹⁷ *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); and *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review*

Next, Employee asserts that Agency has delineated a chain of events that are impossible because it reflects all actions occurring during the course of one day. He further argues the charge for failure to issue a NOI was untimely because the alleged infraction occurred in 2004, and he was charged four years later in 2008. Employee did not offer any legal authority to support his contention that the NOI charge should be time barred. Furthermore, the timeline of events are of no particular consequence because the Employee did not issue the required citations for the licensing violations. Therefore, the timeline of the events leading to the charges against Employee and timeliness of the NOI infraction charge are moot and not material to the outcome of this case.¹⁸

Employee further contends that there was no basis for the AJ to disregard his handwriting expert. However, it is clear from the record that the AJ did not disregard the handwriting expert, but he does find that relying on statements made by an out of state handwriting expert is not sufficient evidence.¹⁹ Employee could have requested the AJ to subpoena said witness or requested the expert to testify on his behalf in a forum where he could be cross-examined by Agency. Moreover, Employee could have secured a local handwriting expert to testify. He failed to do either. The court held in *Mitchell v. District of Columbia*, 736 A.2d 228 (D.C. 1999) (quoting *Jadallah v. District of Columbia Department of Employment Services*, 476 A.2d 671,676 (D.C. 1984), that:

It is one thing to hold to that hearsay evidence is admissible at agency hearings, but quite another thing to say that the direct sworn testimony of a witness on a crucial fact can be effectively refuted by hearsay, i.e. the statements of persons not produced as witnesses – and hence not subject to cross-examination – when the party relying on such statements is in position to call the declarants to the stand.

(November 23, 2009).

¹⁸ There is no provision or statute of limitations on record that would bar Agency from bringing charges of misconduct against Employee. *Agency's Opposition to Employee's Petition for Review*, p.9 (May 6, 2011).

¹⁹ *Initial Decision*, p. 6 (March 7, 2011).

Thus, it was reasonable for the AJ to make his own assessment of the handwriting on the application.

Employee also argues that the AJ exhibited bias toward him. The AJ did state that Employee had taken advantage of unsophisticated immigrant and entrepreneur by leading the business owner to believe that he would help obtain the requisite business license.²⁰ Bias cannot be determined by this statement. It is the AJ's assessment, which could be deemed dicta. At any rate, the statement was *de minimus* in light of the evidence and testimony presented at hearing that support the allegations of malfeasance.

The final issue raised by Employee was the charge regarding the referral to an expediter. Employee argues that due process was denied because the AJ did not respond to this allegation. According to OSI's report, Employee admitted that he provided business owner with contact information for a private contractor, an expediter, to assist with the process of obtaining a business license. Employee gave the OSI investigator the expediter's contact information. The expediter, a former DCRA employee confirmed that Beau Nails was indeed a client, and she served as a registered agent of the business because the owners were not District residents.²¹ In light of the OSI report, testimony provided by the business owner, and the AJ's assessment of their credibility, it is reasonable to believe that Employee referred an expediter to business owners.

Substantial Evidence

Employee contended that the malfeasance charge was not based on substantial evidence and that all material issues of law and fact were not addressed. According to OEA Rule 633.3, the Board may grant a petition for review when the AJ's decisions are not based on substantial

²⁰ *Id.*

²¹ *Answer to Employee's Appeal*, Attachment 15 (January 2, 2009).

evidence or when the initial decision did not address all material issues of law and fact. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²² After reviewing the OEA hearing transcript, a reasonable mind could accept Agency's witnesses as credible and adequate to support its decision to remove Employee.

Per Employee's position description, one of his duties is to issue citations to businesses that do not have the necessary license. Employee never issued a citation to the salon as was his duty. He concedes this point and excused it as permissible based on his workload. As the AJ provided in his Initial Decision, it is clear from the Agency's written protocol that Employee has a duty to ensure that businesses operating in the District possess the proper licenses by citing persistent offenders, and he failed to do so.²³ Additionally, Employee had an obligation to conduct himself in an ethical manner, which would include not accepting or requesting money from a business that he is investigating. Therefore, Agency's charges against Employee were based on substantial evidence.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²⁴ According to the *Stokes* Court,

²²*Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

²³ DPM Chapter 16 (February 22, 2008).

²⁴ *Anthony Payne v. D.C. Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion*

OEA must decide whether the penalty was within the range allowed by law, regulation and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.

Penalty within the Range Allowed by Law, Regulation or Applicable Table of Penalties

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government Employees. Section 1619 of the DPM clearly lists the penalties for malfeasance. This section defines malfeasance as “doing something illegal.” This term is often used when a professional or public official commits an illegal act that interferes with the performance of his or her duties. This includes “misuse, mutilation or destruction of government property; concealment, misuse, removal, mutilation, alteration of government property, public records or funds; misuse of official position for unlawful or personal gain.” A charge for malfeasance ranges from suspension for thirty days to removal for the first offense. The penalty for the second offense is suspension for forty-five days to removal and removal for the third offense.²⁵ As previously stated, Employee obtained \$200 from unlicensed business owner and failed to issue a NOI for unlicensed business as required by law. Removal is appropriate for the first, second or third offense of malfeasance. Therefore, Agency properly removed Employee.

Penalty Based on Consideration of Relevant Factors

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but to ensure that “managerial discretion has been legitimately invoked and properly exercised.”²⁶ OEA has previously held that the primary responsibility for

and Order on Petition for Review (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

²⁵ DPM Chapter 16 (February 22, 2008).

²⁶ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.²⁷ Agency's reliance on DPM §1619 to determine the penalty for the malfeasance charge is proper. As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.²⁸

An agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion. The evidence did not establish that the

²⁷ *Huntley v. Metropolitan Police Department*, OEA Matter No.1601-0111-91, *Opinion and Order on Petition For Review* (March 18,1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition For Review* (July 2,1940); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 *Opinion and Order on Petition For Review* (February 10, 2011); and *Holland v D.C. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition For Review* (April 25, 2011).

²⁸ *Love* also provided that "[OEA 's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its work force. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within the tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R.313, 5 M.S.P.R. 280 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- (1) the nature and seriousness of the offense, and it's relation to the employee's duties, position and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) the potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

penalty of removal constituted an abuse of discretion in the current matter.²⁹

Agency presented evidence that is considered relevant as outlined in *Douglas* in reaching the decision to remove Employee. Agency gave credence to the nature and seriousness of the offense; Employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public and the prominence of the position and the notoriety of the offense or its impact upon the reputation of the agency; and the clarity with which Employee was on notice of any rules that were violated in committing the offense.³⁰

No Clear Error of Judgment by Agency

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for malfeasance, as evidenced in Chapter 16 of the DPM. Consequently, we must **DENY** Employee's Petition for Review.

²⁹ *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

³⁰ Agency's Answer, p. 1-3. (January 2, 2009).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.